

ORIGINAL RECEIVED-FPSC
02 DEC 27 PM 4:50
COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination
of Need for Hines Unit 3 Power
Plant.

Docket No.: 020953-EL
Filed: December 27, 2002

_____ /

**POSTHEARING STATEMENT AND BRIEF OF FLORIDA
PARTNERSHIP FOR AFFORDABLE COMPETITIVE ENERGY**

Pursuant to Order No. PSC-02-1650A-PHO-EL and Section 120.57(1), Florida Statutes, FLORIDA PARTNERSHIP FOR AFFORDABLE COMPETITIVE ENERGY ("PACE"), files its Post Hearing Statement and Brief.

STATEMENT OF BASIC POSITION:

Florida Power Corporation's ("FPC") selection of Hines 3 does not meet the statutory criteria set forth in Section 403.519, Florida Statutes, for several reasons. First, FPC has directly admitted that the proposed Hines 3 unit is not needed for system reliability and integrity. The evidence also shows that FPC does not need the unit for purely economic reasons; specifically, although FPC claims that Hines 3 will save \$25 million in "production costs," these purported savings are substantially outweighed by the capital-related revenue requirements associated with the unit. Moreover, even assuming additional power supply resources were needed, FPC has not shown that its self build option is the most cost effective capacity alternative. FPC does not have a secure source of water for the Hines 3 unit, which calls into question the reliability and cost effectiveness of Hines 3. Further, the Hines 3 unit is not guaranteed by the combustion turbine manufacturer to operate within the guidelines established by the

AJS _____
CAF _____
CMP _____
COM 3 _____
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____
SEC 1 _____
OTH _____

Florida Reliability Coordinating Council ("FRCC"), rendering its reliability doubtful if it

RECEIVED & FILED
RDM
1
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER DATE
14063 DEC 27 02
FPSC-COMMISSION CLERK

does not meet the FRCC guidelines, and its cost effectiveness suspect because the ultimate cost of addressing this issue – if, indeed, it is addressed at all – will almost certainly be greater than the cost included in FPC’s current projections. Also, FPC has not properly allocated the costs of existing infrastructure at the Hines Energy Complex, in that certain costs common to Hines 1, Hines 2 and Hines 3 have not been appropriately assigned to Hines 3. This calls into question the accuracy of the cost analysis and, ultimately, the cost effectiveness of Hines. FPC also appears to have modeled Hines 3 at an unrealistically low heat rate (approx. 6,900 Btu/kwh), as compared to: 1) the value reported in its most recent Ten-Year Site Plan (7,306 Btu/kwh); 2) the heat rate stated in FPC’s initial RFP; and 3) the actual heat rate realized at Hines 1, the “sister unit” of Hines 3. This difference in heat rate results in substantial cost impacts to FPC customers and significantly affects the cost effectiveness of the Hines 3 unit. Finally, if the Florida Public Service Commission (“Commission” or “PSC”) grants a determination of need for Hines 3 — and PACE contends it should not -- FPC should be held to the same cost terms of its Hines 3 proposal for all regulatory purposes as would have been required of competing alternative capacity suppliers.¹

ISSUE 1: Is there a need for the proposed Hines Unit 3, taking into account the need for electric system reliability and integrity, as this criterion is used in Section 403.519, Florida Statutes?

PACE: **No. FPC admits there is no present need for the Hines 3 unit because it can operate its system with reliability and integrity at a**

¹ The costs include capital costs, heat rate as represented in the cost comparisons of average heat rates found in Confidential Exhibit 10, and availability factor.

15% reserve margin. FPC's system will be at a 17% reserve margin in 2005-06 without the Hines 3 unit, which more than ensures system reliability and integrity.

Section 403.519, Florida Statutes, authorizes the Commission to grant a need determination when it determines, based on factual evidence in the record, that there is a need for an electrical power plant. In making its determination, the PSC must consider the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost effective alternative available.

FPC asserts that it "needs" Hines 3 in order to meet a 20% reserve margin planning criterion that has been established pursuant to stipulation by the four investor-owned utilities in Florida. (Tr. p. 54, lines 1 -- 11). However, the unrefuted facts of record in this case establish that the Hines 3 unit is not needed to ensure system reliability and integrity. FPC indicated that a 17% reserve margin in 2005-06 is sufficient for it to maintain system reliability and integrity, and no record evidence suggests that this 17% reserve margin will jeopardize system reliability and integrity. Indeed, FPC admitted that its system is not jeopardized even at the 15% reserve margin (Tr. p. 58, line 24 - p. 59, line 7; Exhibit 2), and, in fact, FPC historically has ensured system reliability and integrity using a 15% reserve margin. (Tr. p. 53, lines 13-22.) Deferring the Hines 3 unit will

place the FPC system at a 17% reserve margin figure – a figure significantly above its historical 15% reserve margin planning criterion (Exhibit 2) and more than adequate to ensure system integrity and reliability.

FPC witness Crisp testified that the stipulated 20% reserve margin criterion was the planning criterion used in deciding to seek a determination of need for Hines 3. (Tr. p. 53, lines 1 – 4). Apart from that stipulated figure – which is not codified in Commission rule and for which no factual or rational basis has been established in the record of this proceeding -- there is no evidence of record to support FPC’s position that Hines 3 is needed to ensure system reliability and integrity. Simply put, FPC has not shown that Hines 3 is needed in 2005-06.

FPC suggests that its system integrity and reliability will be improved if it adds Hines 3, at an alleged cost of \$258 million dollars,² so that its reserve margin figure will well exceed 20%. However, accepting this argument would allow FPC, at any time it chooses, to “justify” adding new plant.

FPC could establish that a 25% reserve margin ensures system integrity

² The evidence indicates that the actual capital cost likely will be significantly greater than the asserted \$258 million dollar value. First, there may be additional capital costs, or additional operating costs, or both, associated with the yet-to-be-specified “commercial terms” with Siemens Westinghouse regarding the underfrequency issue. Second, with respect to the cooling water source for Hines 3, the Commission should reasonably expect that the water plan embodied in FPC’s cost estimates was the lowest cost plan available. However, since that plan has been strenuously objected to by the Southwest Florida Water Management District, it is highly likely that the water supply plan ultimately implemented will have higher capital and operating costs. If, for example, FPC has to obtain reuse water from a treatment plant five to fifteen miles away from the Hines Complex, the capital costs just for the piping will be several million dollars.

and reliability more than a 20% reserve margin, a 30% reserve margin ensures system reliability and integrity more than a 25% reserve margin, and so forth. In essence, FPC argues that if some additional reserve margin is good, then more must be better. An affirmative determination of need should not be based on such reasoning, particularly since it is completely unsupported by any evidence in the record of this proceeding.

FPC attempts to justify Hines 3, notwithstanding that it has historically provided for a reliable system using a 15% reserve margin planning criterion, by relying on a stipulation that it entered into with the state's other investor-owned utilities. The stipulation provided that these utilities would use a 20% reserve margin criterion for planning purposes. (Tr. p. 57, lines 3-6.) Although the PSC closed a docket established to review the appropriate reserve margin by acknowledging the existence of this stipulation, there was never the first shred of evidence presented at an evidentiary hearing to support this 20% figure. (Tr. p. 57, lines 7-14.) The stipulation – which is a mere agreement by the state's four investor-owned utilities (IOUs) -- could have been for 25%, 30%, or whatever figure to which the four parties agreed. That the investor-owned utilities entered into this stipulation does not legally render the stipulated figure rational or based on legitimately determined need. In fact, because the 20% reserve margin figure is not supported by any evidence whatsoever in the record of this proceeding, any reliance on this figure to determine a need for the Hines 3 unit is arbitrary and capricious as a matter of law. Section

120.57(1)(e)2.d., Florida Statutes.

FPC now seeks to impose at least a \$258 million dollar investment, plus associated operating costs, on its ratepayers to honor an agreement it made with its investor-owned utility brethren. In doing so, FPC asks this Commission to ignore its history of operating a reliable system at a 15% reserve margin, disregard its sworn interrogatory answer that it can operate the system with integrity and reliability at a 17% reserve margin (a figure that does not include Hines 3) and overlook the fact that FPC witness Crisp, who plans for both the FPC system and the Carolina Power and Light system, uses a reserve margin figure of between 12-15 percent (%) in planning for the system in North and South Carolina. (Tr. p. 56, lines 2 - 7.) While witness Crisp testified that the Carolina system had less transmission congestion than the Florida system, such congestion might justify the difference between Carolina's 12% reserve margin on the low end and Florida's historical figure of 15%. It is doubtful that such transmission constraints – the existence of which is not established by evidence in the record – can support a planning reserve margin difference of 12% of the low end for the Carolina Power and Light system versus 20% on the low end of the Florida Power Corporation system. Simply put, FPC has utterly failed to demonstrate by record evidence that the Hines 3 unit is needed, taking into account system integrity and reliability.

ISSUE 2: Is there a need for the proposed Hines Unit 3, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519, Florida Statutes?

PACE: **No. There is no present need for the Hines 3 unit. Further, FPC's own data show that the 2005 capital-related costs of Hines 3 are more than double FPC's claimed 2005 production cost savings, which demonstrates that adding Hines 3 in 2005 is not economic.**

The arguments set forth in response to issue 1 are adopted and incorporated herein in their entirety. The only possible justification for the plant would be that it is needed on an economic basis. However, the unit's projected capital-related revenue requirements (calculated from FPC's data in Exhibit 10) are more than double FPC's claimed operating cost savings of \$25 million dollars in 2005.³ Thus, the Hines 3 unit is not needed for economic reasons because adding it in 2005 will raise, not lower, the average cost of energy delivered by FPC. Building a plant that is not needed and is not even able to be connected presently to the electric grid, because it does not meet FRCC reliability guidelines, cannot be determined to meet a need for adequate electricity at a reasonable cost.

ISSUE 3: Has Florida Power Corporation met the requirements of Rule 25-22.082, Florida Administrative Code, "Selection of Generating Capacity."

³ This is readily demonstrated by multiplying the 2005 total annual fixed costs for Hines 3 (in dollars per kW-year) shown in Exhibit 10 by the Hines 3 unit's capacity of 537,000 kW, and then comparing this result to the claimed \$25 million savings in operating costs.

PACE: No. Implicit in this rule is the requirement that a fair, “apples to apples” comparison be performed. FPC, when considering outside proposals, considered factors that were not set forth in its RFP and unfairly discriminated against outside proposals when applying other factors.

FPC must comply with Rule 25-22.082, F.A.C. entitled the “Selection of Generation Capacity” (nicknamed the “Bid Rule”) before its need determination can be approved. The rule requires that a “detailed description of the methodology to be used to evaluate alternative generating proposals on the basis of price and non-price attributes” be provided. This requirement exists to inform the bidders of the material factors that will be considered when evaluating proposals. It presumably also means the factors used to judge proposals will be applied uniformly to FPC’s self-build option and to the outside proposals. It is inconsistent with both the letter and the spirit of the Bid Rule for the investor-owned utility to describe a methodology that will be used to evaluate the bids, then depart from that methodology, apply criteria in judging bids that were not disclosed to the bidders, or apply criteria to its self build proposal in a manner different than the same criteria are applied to outside proposals. In this case, FPC’s evaluation of the bids failed in all three respects.

There is no dispute that FPC set forth a methodology in its RFP documents. However, evidence in the record establishes that other

factors not disclosed to the bidders were considered by the FPC team charged with evaluating the bids, in violation of Rule 25-22.082. Evidence in the record also establishes that FPC applied criteria to its self build proposal in a materially different manner than it applied the same criteria to outside proposals. Specifically, documentary evidence introduced at hearing established that during the evaluation of a proposal, whether the proposal facilitated the development of a merchant plant was a factor FPC considered in reviewing and summarizing the bids. (Confidential Exhibit 6; Tr. p. 157, lines 9 – 25, p. 158, lines 1 - 4) It is unrefuted that the notion of facilitating a merchant plant development was noted in summary conclusions of at least two of the proposals. These summaries were relied upon during the evaluation process. (Tr. p. 157, line 9 – 25, p. 158, lines 1 - 4). Whether a proposal facilitated the development of a merchant plant was not a criterion disclosed to the bidders, yet it was a factor deemed significant by members of the team that reviewed the bids. This failure to disclose a criterion material to the bid selection process is a material violation of Rule 25-22.082, and has no bearing in determining whether a proposal is cost effective or reliable.

FPC also violated the Bid Rule by using a “double standard” when evaluating outside proposals as compared to its own self-build proposal. Evidence in the record shows that FPC would not contract with outside bidders if a firm fuel transportation agreement were not in place. (Exhibit 7; Tr. p. 284, line 1). Yet when evaluating its own bid, it disregarded the

lack of a firm fuel transportation agreement. (Tr. p. 178, lines 13 - 23). This use of a double standard in evaluating the proposals submitted in response to the RFP violates the spirit and intent of the Bid Rule. The Commission should not permit FPC to employ a standard that is tantamount to “if it is good for the goose, it is NOT good for the gander.”

ISSUE 4: Is the proposed Hines Unit 3 the most cost-effective alternative available, as this criterion is used in Section 403.519?

PACE: No. FPC has failed to prove Hines 3 is the most cost-effective alternative available due to uncertainties regarding water availability, estimated costs, operating heat rates, ability to meet FRCC reliability guidelines and the actual need for the Hines 3.

FPC, as the party seeking a need determination in this case, must demonstrate by a preponderance of competent substantial evidence in the record, that it meets the standards set forth in Section 403.519, Florida Statutes, thus entitling it to the grant of a need determination by the Commission.⁴ Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). FPC has failed to meet its burden in a number of respects, leaving the Commission unable to conclude that Hines 3 is the most cost effective alternative. In the simplest terms, the Commission cannot determine cost effectiveness where it does not know what the cost

⁴ Rules 25-22.080 and 25-22.081, F.A.C., governing the process for seeking a determination of need for a power plant from the Commission, are codified in Part VI of Chapter 25-22, entitled “Permitting Proceedings.” J.W.C. instructs that it is “fundamental that an applicant for a license or permit carries the ‘ultimate burden of persuasion’ of entitlement through all proceedings....” Id. at 787.

is.

As discussed in Issue 1, FPC failed to establish that the plant is needed to preserve system reliability and integrity. FPC merely proved it “needs” Hines 3 to comply with an agreement it made with other investor-owned utilities. In fact, FPC admitted that a 20% reserve margin is not actually needed, in the sense that system reliability and integrity can be maintained at a 17% or lower reserve margin without the Hines 3 unit. To this end, FPC concedes that it historically has been able to maintain system reliability and integrity at a 15% reserve margin planning level, and that a 15% figure does not jeopardize FPC’s system integrity and reliability.

FPC also failed to meet its legal burden of proof to establish that the Hines 3 unit is the most cost effective alternative.⁵ This need determination proceeding is a Section 120.57 formal evidentiary proceeding in which the

⁵ Moreover, the proposed Hines 3 generating unit was not, and is not, the most cost-effective alternative available to meet FPC’s alleged need. That position belongs to Bidder B, which FPC conveniently disqualified because of concerns over site control and transmission. By disqualifying Bidder B, FPC avoided having to negotiate with Bidder B and avoided giving Bidder B an opportunity to sharp-pencil its offer, which was already more cost-effective than Hines 3 on a net present value basis over the first five years of a proposed contract term. See Confidential Exhibit 10. FPC would have served its captive customers better, and minimized their risks, including (a) market risk, (b) cost risk relating to the Hines 3 underfrequency and water supply issues, and (c) operating cost risk relating to the unrealistic heat rate that FPC assumed for Hines 3, by signing a five-year contract with Bidder B, or at least by inviting Bidder B to negotiate for an even better price and to assure itself that Bidder B could have satisfied FPC’s concerns regarding site control and transmission. If and when the underfrequency and water supply issues are ultimately resolved, and the costs thereof are known, FPC could proceed to seek a need determination for a realistically evaluated Hines 3 unit.

seeker of the need determination must provide evidence, which becomes part of the record, that establishes the sole basis upon which the finder of fact may rely in making factual findings upon which its decision will be based. Section 120.57(1)(j), Florida Statutes. As a matter of law, this burden cannot be met by offering evidence that is contingent on events or conditions that may or may not occur in the future. In Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644 (Fla. 3d DCA 1992), the court held that evidence of contingent future events or conditions was insufficient, as a matter of law, for the applicant to meet its burden of demonstrating by a preponderance of competent substantial evidence that its proposed project would meet all requirements of law. Similarly, in this case, FPC relies heavily on “proof” that asks the Commission to accept as true the occurrence of future events, the outcome of which currently are unknown.

The underfrequency issue presents the most striking example of the contingencies on which FPC relies in this case. The uncontroverted facts are: The Westinghouse turbine equipment presently is not warranted to operate in a manner that meets the reliability standards of the Florida Reliability Coordinating Council. (Tr. p. 74; Exhibit 3). The FRCC is charged with ensuring that the electric grid in Florida is operated and maintained in a safe and reliable manner. FPC has agreed not to interconnect its Hines 3 unit to the grid unless and until the

underfrequency problem is solved.⁶ (Exhibit 3). Obviously, such a representation and agreement would not be needed if the equipment currently complied with the FRCC reliability requirements. Siemens Westinghouse is preparing to conduct tests in Germany related to its combustion turbines, including the combustion turbines to be used at Hines 3, and the underfrequency problem. (Tr. pp. 88, 246). The tests have not yet been conducted so the results are not known. Thus, whether a solution to the underfrequency problem will be forthcoming is unknown.

Not surprisingly, the combustion turbine manufacturer is optimistic that the problem will be solved and a solution forthcoming. (It is extremely hard to imagine that a manufacturer with hundreds of millions of dollars in equipment sales potentially affected by this issue would express anything short of optimism in solving the problem.) However, this Commission must decide the case on the facts before it at this time -- not on what the facts might be six or eight months from now. The fact currently before the Commission is that the proposed unit is unable to connect to the grid in accordance with FRCC reliability guidelines. The evidence also shows that the “commercial terms” -- i.e., the cost -- of resolving this problem are not known; correspondence from Siemens Westinghouse indicates there will be additional costs associated with resolving this issue. (Exhibit 14.) It is inapposite -- indeed, logically impossible -- to find the Hines 3 unit the

⁶ FPC’s “commitment” is no solution at all. If the unit is not connected to the grid, it cannot supply power to FPC’s customers. The fact that it is not known whether Hines 3 will ever be able to connect to the grid renders it inherently unreliable and, therefore, not cost effective.

most cost-effective, reliable option available when the very ability to connect to the grid, as well as the capital and operating costs of doing so, are completely unknown.

Moreover, while the manufacturer expresses confidence that it can overcome this problem, it pointedly notes that the “commercial” terms of the solution will be addressed in the future. (Exhibit 14) In the letter from Siemens Westinghouse to FPC witness James Murphy, Siemens Westinghouse project manager states: “Commercial and technical details can be worked out later prior to the units synchronizing to the grid.”). In other words, the costs of the solution -- if one can be found -- will be dealt with later.

However, by law, FPC has the burden to show its Hines 3 unit is (present tense) the most cost effective alternative. The Legislature, in enacting Section 403.519, did not give FPC the leeway to prove its Hines 3 unit might be (future tense; built on a series of assumptions as to contingent future events) the most cost-effective. To underscore the degree of uncertainty associated with this issue, when FPC was asked by Commissioner Deason whether it would be willing to bear the risks associated with the underfrequency problem, FPC would not do so. (Tr. p. 99).

FPC also asks this Commission to grant its need determination on the

notion that sufficient water will be available at no additional costs to FPC. This “fact” remains to be seen, as FPC testified that it is pursuing additional water sources through recently filed proceedings.⁷ These proceedings are ongoing, so it cannot be established by substantial evidence what additional costs for water, if any, will be incurred. The uncontroverted facts established that Hines 3 is proposed to be constructed in a Water Use Caution Area, that Hines Unit 3 will be cooled by the existing Hines Energy Complex cooling pond, that FPC’s recent attempt to transfer ground water from its Tiger Bay facility to the Hines Energy Complex cooling pond was strenuously opposed and objected to by the Southwest Florida Water Management District (“SWFWMD”), that the existing permit for the Hines Energy Complex requires FPC to utilize water reuse options before using ground water, and that SWFWMD has asked FPC to investigate reuse water options from the City of Fort Meade, the City of Mulberry, and the City of Lakeland wastewater outfall into the Alafia River. (Tr. pp. 67-68, 160; Exhibits 17, 18). Thus, it is by no means established whether Hines 3 has an adequate cooling water source, or what that source is or will be.

Obviously, if FPC is denied the ability to use ground water and is required to use reuse water, the costs of securing the reuse water, treating it, and

⁷ While FPC witness Crisp claimed that FPC already has a permit for Hines 3 to use 5 million gallons of water per day. This is not correct, and cannot be correct, as a matter of law, because FPC does not have the requisite site certification to build and operate Hines 3. The permit to use ground water to operate Hines 3, if such a permit is obtained at all, can only be obtained as part of the site certification for the plant, which is “the sole license of the state and any agency as to the ... construction and operation of the proposed electrical power plant” pursuant to Section 403.511, Florida Statutes.

pipng and pumping it to the Hines Energy Complex will be significant, substantially impacting the cost effectiveness of Hines 3. The evidence fails to establish whether ground water will be available for Hines 3 -- and, if it is not, what water source -- if any -- will be available. The occurrence of future contingent actions and events -- particularly when the agency charged with protecting water in the area has objected to additional ground water being transferred and used at the Hines Energy Complex -- cannot constitute credible evidence to sufficient support a factual finding that Hines 3 has secured an adequate reliable water supply. Just as the feasibility and potential costs for the underfrequency "solution" are unknown, so too are the potential costs and availability of cooling water for the Hines 3 unit. Based on this lack of certainty with respect to the key water supply issue, Hines 3 unit cannot be determined to be the most cost effective alternative available.

Finally, FPC asks this Commission to find Hines 3 the most cost effective unit based on a heat rate that is overly optimistic. FPC's 2002 Ten Year Site Plan listed a heat rate for the Hines 3 unit at 7,303 btu/kWh. In its RFP documents, the Hines 3 Heat Rate dropped to approximately 7100 btu/kWh. When evaluating the bids, the heat rate to beat dropped even further, to 6903 btu/kWh. The estimated heat rate FPC used to declare itself the winner of the RFP, a heat rate which improves over time, is considerably lower than the average heat rate realized by Hines 1, described as the sister unit to Hines 3. (Tr. p. 256). An aggressive

estimated heat rate, rather than the actual heat rate of a sister plant, should not be relied upon for factual findings of cost effectiveness.

If the aggressively low estimate is accepted, it should be used not just for determining cost effectiveness in a need determination proceeding, but also for all subsequent FPC regulatory proceedings involving the Hines 3 unit. To allow an investor-owned utility to use an aggressive heat rate during a competitive RFP process, then subsequently permit the utility to seek cost recovery based on a higher (more costly) heat rate in future regulatory proceedings fail to protect ratepayers, abrogates the integrity of the Commission's decision-making processes, fails to give FPC ratepayers the benefit of the "winning" response to the RFP, sends the wrong message to bidders, and could be construed as encouraging IOU "low balling" to win the RFP. FPC's ever-changing heat rate cannot serve as the basis for concluding that the Hines 3 unit is the most cost effective alternative.

For the reasons set forth above, and, as a matter of Florida law governing burden of proof and standards of evidence, FPC has not met its burden to demonstrate that the Hines 3 unit is the most cost effective alternative available.

ISSUE 5: Are there any conservation measures taken by or reasonably available to Florida Power Corporation which might mitigate the need for the proposed power plant?

PACE: No position.

ISSUE 6: Has Florida Power Corporation adequately ensured the availability of fuel commodity and transportation to serve Hines Unit 3?

PACE: **No. Ensuring fuel transportation and fuel availability is accomplished through firm contracts, which Hines 3 lacks. FPC stated that it should not contract for capacity and energy with bidders who do not have firm gas transportation contracts. FPC should be held to its own standard regarding fuel transportation.**

As previously discussed in addressing issue 3, FPC used a double standard when evaluating outside proposals compared to its own self-build proposal, and those arguments are incorporated herein by reference. An additional issue is “whether FPC has adequately ensured the availability of fuel commodity and transportation to serve Hines 3.” Webster’s dictionary defines “ensure” “to make sure or certain; guarantee.” The record is devoid of evidence that FPC ensured or guaranteed that fuel transportation will be available. Obviously, FPC knows how to ensure that fuel transportation is available (having in place a contract for firm transportation), because it apparently has a policy of not contracting for capacity and energy with a bidder unless the bidder has in place a contract for firm transportation. FPC does not have any contracts for firm fuel transportation or fuel supply for Hines 3.

The evidence on which FPC apparently relies to establish that gas transportation and supply may be available was in the form of testimony

from a witness with only two years' experience in the Florida gas market, which relied strictly on industry reports and documents, and had performed no independent analysis in "arriving at" her conclusion. Ms. Murphy, who was not tendered as an expert witness, simply repeated what she had read in industry publications and reports. The documents and reports are hearsay that does not fall within any exception to the hearsay rule. This information is hearsay, and although it is admissible, it cannot form the sole basis of a finding of fact by this Commission. Section 120.57(1)(c), Florida Statutes. Therefore, Ms. Murphy's testimony, which is based only on this hearsay evidence and not on her own personal knowledge, cannot constitute competent substantial evidence to support a finding that FPC has demonstrated an adequate fuel supply or fuel transportation. In Doyle v. Florida Unemployment Appeals Comm'n., 635 So. 2d 1028 (Fla. 1st DCA 1994), the court determined, on facts very similar to the case at bar, that testimony based on documents rather than on first-hand knowledge of the witness, did not constitute independent, non-hearsay evidence, and, therefore, did not constitute competent substantial evidence on which findings of fact could be based. FPC offered no other non-hearsay evidence to support a finding by the Commission that an adequate gas supply and transportation is available for Hines 3. Accordingly, as a matter of law, FPC has not demonstrated the reliability or cost-effectiveness of this key aspect of the Hines 3 Unit.

ISSUE 7: Based on the resolution of the foregoing issues, should the Commission grant Florida Power Corporation's petition to determine the need for the proposed Hines Unit 3?

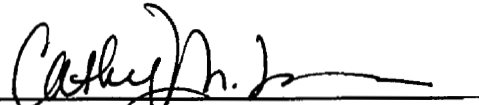
PACE: **No. The Commission should not approve the expenditure of \$258 million for a power plant that does not meet FRCC reliability guidelines, in violation of Section 403.519, Florida Statutes. Moreover, without Hines 3, a 17% reserve margin exists in 2005-06, a figure that FPC admits provides system integrity and reliability.**

FPC has not met its burden to prove that Hines 3 is needed to ensure system reliability or integrity or to provide adequate electricity at a reasonable cost. Nor has FPC met its burden to prove that Hines 3 is the most cost effective alternative. The Commission should deny FPC's petition, or, at the very least, defer ruling on the petition until testing on the Westinghouse turbines related to the underfrequency issue has been completed and a final water supply plan has passed muster, without objection from the Southwest Florida Water Management District. The Commission should decline to approve a need determination for Hines 3 when the facts establish the following: (1) FPC admits a 17% reserve margin for 2005-06, which does not include Hines 3, is sufficient for system integrity and reliability; (2) FPC admits the Westinghouse combustion turbine to be used at Hines 3 does not presently comport with FRCC reliability standards; (3) FPC will not even connect Hines 3 to the electric grid unless certain underfrequency issues, which are the subject of upcoming tests, are satisfactorily resolved; (4) the PSC has no evidence

of how much the solution, to the underfrequency matter, if one is attained, will cost, yet has in evidence a letter from the manufacturer indicating that additional costs will be forthcoming; (5) FPC is obligated to use reuse water to cool Hines 3 if such reuse water is available. However, FPC has failed to fully investigate the availability of reuse water, and the costs associated with reuse water, notwithstanding a direct request for such investigation from the SWFWMD; (6) FPC has no firm contracts in place for gas supply or transportation for the Hines 3 unit while maintaining that purchase power contracts with outside bidders should not be considered without firm fuel transportation agreements in place; and (7) FPC used a heat rate in evaluating proposals and in presenting its case to the Commission that was lower than the heat rate set forth in its 2002 Ten Year Site Plan, lower than the heat rate set forth in its initial Hines 3 RFP documents, and lower than the average heat rate actually realized by an operating sister unit of the Hines 3 unit. Tellingly, FPC refuses to be bound for regulatory cost recovery purposes to the heat rate represented in its need case presented to this Commission.

ISSUE 8: Should this docket be closed?

PACE: Yes, after FPC's petition for need determination is denied. Alternatively, this docket should remain pending for additional evidence regarding whether Hines 3 can safely be connected to the electric grid without violating FRCC reliability standards, particularly given FPC's unwillingness to assume the risks associated with the underfrequency issue.



Jon C. Moyle, Jr.

Florida Bar No. 727016

Cathy M. Sellers

Florida Bar No. 0784958

Moyle, Flanagan, Katz, Raymond & Sheehan, P.A.

The Perkins House

118 North Gadsden Street

Tallahassee, Florida 32301

Telephone: (850) 681-3828

Facsimile: (850) 681-8788

Attorneys for Florida Partnership for
Affordable Competitive Energy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail and by e-mail and facsimile to all listed below on this 27th day of December, 2002:

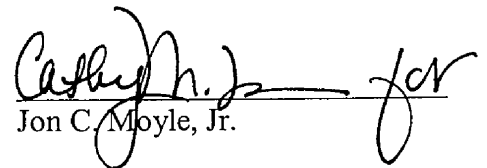
Lawrence Harris, Esquire
Marlene Stern, Esquire
Legal Division
Florida Public Service Commission
Gunter Building
2540 Shepard Oak Boulevard
Tallahassee, Florida 32399-0850

Gary L. Sasso, Esquire
Jill H. Bowman, Esquire
Carlton Fields Law Firm
One Progress Plaza
200 Central Avenue, Suite 2300
St. Petersburg, Florida 33701

W. Douglas Hall, Esquire
Carlton Fields Law Firm
215 South Monroe Street, Suite 500
Tallahassee, Florida 32302-0190

James A. McGee,
Associate General Counsel
Progress Energy Service Company, LLC
100 Central Avenue
St. Petersburg, Florida 33701

Mr. Paul Lewis, Jr.
Florida Power Corporation
106 East College Avenue, Suite 800
Tallahassee, Florida 32301-7740


Jon C. Moyle, Jr.